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In the Supreme Court of the United States

October Term, 1970

STANDARD FORGE AND AXLE COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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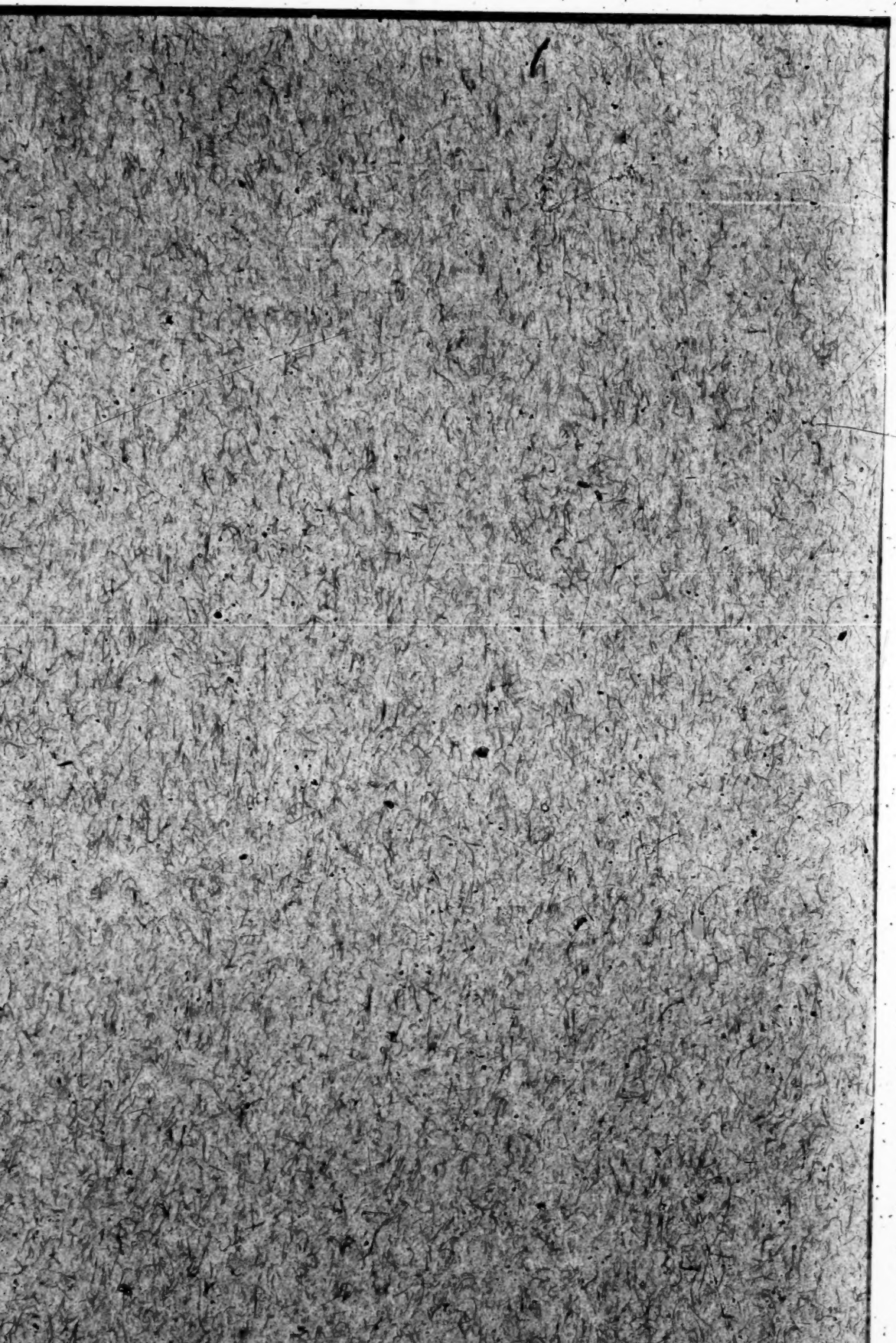

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 1A-8A) is reported at 420 F. 2d 508; the opinion on rehearing (Pet. App. 9A-11A) is reported at 427 F. 2d 344. The Board's decision and order (Pet. App. 12A-78A) are reported at 170 NLRB No. 82.

JURISDICTION

The amended judgment of the court of appeals was entered on August 7, 1970 (Pet. App. 84A). The petition for a writ of certiorari was filed on August 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the National Labor Relations Board that the company violated Section 8(a)(1) of the National Labor Relations Act by keeping a union meeting under surveillance and by threatening its employees that unionization would lead to loss of employment.

2. Whether the Board's procedure was fair and proper.

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 4-5 of the petition. Also relevant are Sections 7 and 8(a)(1) of the Act which provide:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

STATEMENT

A. The Board's Decision

1. *The unfair labor practices*

After one of petitioner's employees, William Cannon, contacted the United Steelworkers of America, AFL-CIO, in September 1966, the Union embarked upon a campaign to organize the Company's plant (A. 10; 147).[1] At the first union meeting, held in mid-October, Cannon was selected chairman of the organizational drive and employees Clarence Litaker and Roy Marston were selected assistant chairmen (A. 10; 148, 154, 162). The Union notified the Company on November 7 that it could make a showing of employee interest at the plant sufficient to obtain a Board representation election; and, on November 23, the Union, by letter, requested recognition (A. 10; 148, 149). On December 5, the Union filed a petition for an election with the Board; a Board election was scheduled for February 23, 1967 (A. 11; 408). The Company's management immediately began an anti-union campaign.

The Board found (Pet. App. 20A-30A, 68A, 71A), and the court of appeals agreed (Pet. App. 2A-3A,

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[1] "A." references are to the Appendix to the parties' briefs filed in the court below.

7A), that the Company coercively interrogated employees concerning their union activities and voting intentions, threatened them with loss of benefits, and offered them inducements, all in violation of Section 8(a)(1) of the Act, and also that it discharged employees Cannon, Litaker, and Marston because of their union activity, in violation of Section 8(a)(3). The petition does not appear to challenge these findings (see Pet. 2-4), but only the further findings that the Company also violated Section 8(a)(1) by keeping a union meeting under surveillance and by circulating a letter which threatened the employees with loss of employment. The facts respecting these matters are as follows:

On Sunday, December 18, 20 to 25 of the Company's employees attended a union meeting at the Union's hall in Prattville, Alabama, a small town near the Company's plant with a business district of one street, two blocks long (A. 21-22; 128, 139-140, 148-149, 157, 214-215). As the employees arrived at the meeting, scheduled for 2:00 p.m., they noticed Foreman Frazier Paul and a known opponent of the Union, employee Clarence Jenkins, sitting in a car parked down the street from the Hall. Paul and Jenkins remained in the car for 30 or 45 minutes while the meeting was in progress (A. 22, 25; 139-140, 148-149, 157, 214-215, 277-280, 284-285). Although Paul and Jenkins allegedly had come to Prattville only to collect a debt owed Jenkins by an employee of a local newspaper whose office was housed in a building alongside the Union's hall (A. 22; 283-284, 276-278), Jenkins admittedly knew that a union

meeting was scheduled that day (A. 23-24; 288). Moreover, when Jenkins first went to the door of the newspaper office, he received no response to his knock but heard noises. Instead of continuing to knock, he returned to the car and waited with Paul for 30 or 45 minutes before making any further effort to see his debtor (A. 23; 278-280).

In its effort to defeat the Union, the Company, on February 9, 1967, distributed to its employees a letter signed by sales manager J. A. Rumbley discussing the effect unionization would have on the Company's sales (A. 25-27, 31; 422-423). A paragraph of Rumbley's letter read:

> Customers buy products on the basis of prices, delivery and dependability. The facts are that in some cases we are the sole source of supply for many of our customers. Our sales to customers who are buying all of their axles from us amounts to more than 70% of our total volume of sales. We have been told by many of these customers that we would not continue to be the sole source of supply if we became unionized, because of the ever present possibility of a work stoppage due to strikes or walkouts [A. 422-423.]

At the Board hearing, the Company conceded that the customers referred to purchased axles from its competitors from time to time (A. 27; 303-305) and that only 3 of these cutomers had said that the Company would cease to be the exclusive supplier of axles; none had threatened to drop the Company altogether (A. 27; 304-305, 308).

On this basis, the Board found that "Paul and Jenkins knew that there was a union meeting in

progress," that they "lingered on the scene in order to keep the union meeting under surveillance," and that the Company thereby violated Section 8(a)(1) of the Act (Pet. App. 34A). The Board also found that Rumbley's letter of February 9, particularly when considered "in the context of many other unfair labor practices, including * * * the discharge of at least one of the leaders of the union movement," contained "the threat * * * that unionization would lead to loss of employment" (Pet. App. 37A-38A).[2]

2. *The procedural issue*

The notice of hearing in this case issued on May 16, 1967; the hearing itself was held on July 18, 19, and 20, 1967, in Montgomery, Alabama (A. 8). During the week prior to the hearing, Company counsel, John Bacheller, visited the Company's plant and interviewed employees in preparation for the hearing (A. 83). These interviews lasted almost three days —July 10, 11, 12—and between 5 and 10 employees were questioned (A. 81, 83). On Friday, July 14, Bacheller received a report that counsel for the General Counsel, J. Thomas McGrath, had told one of

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[2] The Board also found that a circular and a booklet distributed to the employees was violative of the Act since they, like Rumbley's letter, conveyed to the employees "the message that unionization would not only be futile but could only lead to strikes, loss of income, and violence" (Pet. App. 40A). The court of appeals disagreed, finding that the circular and the booklet merely contained a permissible expression of views and opinion (Pet. App. 10A). In view of the factual nature of the disagreement, the Board has sought no further review of this issue.

the interviewed employees that Bacheller's action was improper and could provide the basis for filing an unfair labor practice charge (A. 76). The same day, Bacheller, by telegram, moved the Board's Chief Trial Examiner in Washington, D.C., for a continuance. The motion was denied, for, under the Board Rules and Regulations, 29 C.F.R. Sections 102.24 and 102.16, pre-hearing motions must be addressed to the Regional Director (A. 84-85). No such motion was filed with the Regional Director prior to the hearing. The next day, July 15, Bacheller returned to the Company's plant and reinterviewed the employee who had been advised by McGrath, asking him whether he had been advised to file unfair labor practice charges. The employee "felt his conversation * * * with the Counsel for the General Counsel was a private conversation. And while he would neither affirm or deny the fact that he had been advised to file unfair labor practice charges, he declined to answer" (A. 76).

On Tuesday, July 18, when the Board hearing convened, Company Counsel Bacheller orally moved for a continuance of the proceedings so that the "Trial Examiner or Regional Director can conduct an investigation" of the matter, adding that "should there be a basis found to the truthfulness of the information * * * the remedy would be that employees of Standard Forge and Axle would be advised by the Regional Director and Counsel for the General Counsel affirmatively that we have the right to conduct proper questioning prior to the trial" (A. 90). The Trial Examiner denied the motion for

continuance on the ground that under the Board's Rules motions for an adjournment must be made to the Regional Director, and that the failure to do so here had caused the witnesses, the counsel, and the Trial Examiner to travel a considerable distance. The Examiner expressly provided, however, that Bachelder could renew the motion at the close of the General Counsel's case if he still thought that he had not had an adequate opportunity to prepare the Company's case. Company counsel did not subsequently renew his motion. (Pet. App. 17A-18A, n. 2; A. 86, 88-89).[3]

Company counsel also inquired whether he had the right to question witnesses in regard to what counsel for the General Counsel had told them. The Trial Examiner responded, "I should not commit myself at this point, as to what would be proper Cross Examination on a particular witness" (A. 91). On one occasion during the hearing, Company counsel attempted to cross-examine one of the General Counsel's witnesses respecting his claim of improper conduct by counsel for the General Counsel. Objections to this line of cross-examination were sustained on the grounds that it was outside the scope of the direct testimony and did not raise any doubt as to the truthfulness of the witness' testimony (A. 121-124).

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[3] Upon questioning by the Trial Examiner, counsel for the General Counsel, McGrath, acknowledged that he had talked to employees after Bacheller's interviews, but stated that the Company's allegation as to the contents of his conversations was "false" (A. 83).

The Board held that the Trial Examiner's denial of the Company's motion for a continuance was proper "[i]n view of the fact that the Trial Examiner granted leave to [petitioner] to renew its motion for a continuance at the close of the General Counsel's case if [petitioner] still thought it had not had an adequate opportunity to prepare for the hearing, and the fact that [petitioner] failed to renew such motion" (Pet. App. 13A, n. 1).

3. *The Board's order*

The Board ordered the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with its employees' rights under the Act. The Board also ordered the Company to offer the three employees discriminated against reinstatement with backpay, and to post appropriate notices. (Pet. App. 73A-75A, 13A-14A, n. 4.)

B. The Decision of the Court of Appeals

The court of appeals sustained the Board's unfair labor practice findings and conclusions except in one respect (n. 2, *supra*), and enforced its order (Pet. App. 1A-8A, 9A-11A).[4] The court found that, in the circumstances of this case, "the denial of a continuance was [not] an abuse of discretion by the Examiner" (Pet. App. 8A).

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[4] The court, however, narrowed the order, substituting "in any like or related manner" for "in any other manner" (Pet. App. 10A-11A).

ARGUMENT

1. The substantive questions raised by petitioner are not presented on this record. Petitioner's contention (Pet. 47-52) that Supervisor Paul and employee Jenkins, a known opponent of the Union, did not keep a union meeting under surveillance in violation of Section 8(a)(1) of the Act is based on its premise that the men innocently came upon the union meeting while on a personal errand and departed after accomplishing it; however, the Board found (Pet. App. 34A), and the court of appeals sustained its finding (Pet. App. 4A), that Paul and Jenkins knew that there was a union meeting in progress and that they lingered there in order to keep the meeting under surveillance. Similarly, petitioner's contention (Pet. 41-47) that sales manager Rumbley's letter merely entailed a factual discussion of the effects of unionization upon the Company's sales is contrary to the Board's finding (Pet. App. 37A-38A), which the court of appeals accepted (Pet. App. 4A-5A), that, in the context of the Company's extreme antagonism to the Union, Rumbley's misleading remarks were coercive and designed to convey the message that unionization would lead to loss of employment. See *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620. Petitioner's challenge to these findings thus presents only evidentiary issues, which do not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. Petitioner's allegation of procedural unfairness similarly raises no issue warranting further review. The Trial Examiner has a large measure of discretion in determining whether to grant a continuance, and the question whether that discretion was abused necessarily turns on the facts of the particular case. In any event, for the reasons given by the court below (Pet. App. 7A-8A), the Trial Examiner was clearly reasonable in refusing a continuance here. Moreover, as the court further found (Pet. App. 8A), a "review of the record does not reveal that the action hindered the cross-examination or preparation of Company counsel to any significant extent."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1970.

CERTIORARI DENIED N.C.R.

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